IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON & NEWMAN,

Plaintiff,

v.

FLORENCE ZSCHACH, ET AL.,

Defendants.

Case No: 94CVH08-5929
(Sheward, J.)

(Filed Oct. 11, 1995)

DECISION DENYING DEFENDANTS' MOTION TO DISMISS OR TRANSFER FOR LACK OF SUBJECT MATTER JURISDICTION FILED AUGUST 11, 1995

Rendered this 11 day of October, 1995. Sheward, J.

This matter is before the Court upon the Motion of Defendants Florence Zschach and Marylou Zschach to Dismiss or Transfer for Lack of Subject Matter Jurisdiction filed August 11, 1995; Plaintiff's Memorandum Contra filed August 16, 1995; and Defendants Zschachs' Reply Memorandum filed August 25, 1995.

The Plaintiff law firm brought this suit to recover more than $30,000 in attorney's fees allegedly owed to it by the Defendants. The Defendants, Florence Zschach, Marylou Zschach, and Margaret Ann Slone are the trustees of a testamentary trust created by Clara K. Wirthman, now deceased. According to the Complaint, the Defendants incurred the legal fees in connection with the Plaintiff's representation of them in their roles as trustees. Defendants Florence Zschach and Marylou Zschach filed a Counterclaim which included allegations

of negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress.

In their Motion, the Defendants argue that R.C. 2101.24(A)(1)(d) and 2101.24(A)(1)(l) give the Probate Division of the Court of Common Pleas exclusive subject matter jurisdiction of settlements of accounts with testamentary trustees. They point out that the Plaintiff filed suit over an account which the Defendants entered into as trustees. Thus, they argue that the probate court has exclusive jurisdiction over this case. They asked the Court to transfer the case from the General Division to the Probate Division or alternatively, dismiss it pursuant to Civ.R. 12(H)(3). The Plaintiff, on the other hand, argues that this Court has subject matter jurisdiction because the language of 2101.24(A)(1)(d) and 2101.24(A)(1)(l) does not reach disputes such as this one.

Civ.R. 12(H)(3) provides that,

> [w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

The Franklin County Court of Appeals has suggested that when a suit over which the Probate Division has exclusive subject matter jurisdiction is improperly filed in the General Division, the court should transfer the action instead of dismissing it. *Siebenthal v. Summers* (1978), 56 Ohio App.2d 168.

The parties to this Motion agree that the issue of subject matter jurisdiction is governed by R.C. 2101.24(A)(1)(d) and 2101.24(A)(1)(l):

> Except as otherwise provided by law, the probate court has exclusive jurisdiction: * * *
>
> > (d) To appoint and remove guardians, conservators, and testamentary trustees, direct and control their conduct, and *settle their accounts;* * * *
> >
> > (l) To direct and control the conduct of fiduciaries and *settle their accounts* * * * .

(Emphasis added.) In dispute is whether the Plaintiff's suit to recover legal fees involves a settlement of the trustees' accounts within the meaning of R.C. 2101.24. The movants would have the Court answer this question in the affirmative. The Plaintiff would have the Court answer it in the negative.

To determine whose interpretation of "settle their accounts" is correct, the Court keeps in mind the purposes of probate courts. The power of a probate court is "strictly limited to matters involving the enhancement or depletion of the estate and distribution of that estate to the proper heirs." Carlin & Schwartz, Ohio Probate Law (1989) 27, Section 5.03.

If this Court were to accept the movants' argument, the Court would transfer to probate court a case that – in its current posture – would have no bearing on the enhancement or depletion of the estate of Clara K. Wirthman and would have no bearing on the distribution of the estate to her heirs. This is because, as the Plaintiff points out in its Memorandum Contra, the Defendant-trustees are personally liable to third persons (like the Plaintiff law firm) on obligations they incurred in administrating the trust. 91 Ohio Jurisprudence 3d (1989) 536,

Trusts, Section 489. Moreover, entities with whom a trustee contracts may recover against the trustees personally or against the trustees' estates, but may not execute the judgment against the trust res. *Id.* at 565, Section 522.

As the Plaintiff points out on page 3 of its Memorandum Contra, "If the Defendants wish to pay the judgment from the trust estate, they will presumably do so and then 'settle their account' with the Probate Court." Then and only then would the action have an effect on the depletion of the estate and the distribution of the estate to the decedent's heirs. If this hypothetical action were to be filed, it would be subject to the exclusive jurisdiction of the Probate Division. R.C. 2101.24(A). Since the pending suit will not have an effect on the decedent's estate, it was properly brought in the General Division of Common Pleas Court.

For the foregoing reasons, the Motion of Defendants Florence Zschach and Marylou Zschach is DENIED.

Counsel for Plaintiff shall prepare an appropriate entry pursuant to Local Rule 25.01.

/s/ Richard S. Sheward
RICHARD S. SHEWARD,
JUDGE

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